CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 535.

THE UNITED STATES

vs.

JU TOY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED FEBRUARY 24, 1905.

(19635.)

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1 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
JU TOY, APPELLEE. } No. 1164.

Certificate of the United States circuit court of appeals for the ninth circuit to the Supreme Court of the United States, under section 6 of the act of March 3, 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes."

Ju Toy, the appellee above named, is a Chinese person, who came from the Empire of China to the port of San Francisco, said port being a port of entry for Chinese immigrants, and on October 24, 1904, made application in person to H. H. North, the duly appointed, qualified, and acting officer of the United States in charge of the enforcement of the Chinese exclusion laws at the port of San Francisco, appointed as such officer by the Secretary of Commerce and Labor, and acting under the directions of the Commissioner-General of Immigration, to be admitted to the United States, claiming the right to be so admitted on the ground that he was born in the United States and was a citizen thereof. Thereupon
2 he was given opportunity by said officer to make such voluntary statement in support of his right to be admitted as he might desire, and also to produce such witnesses and offer such proof in support of his claim for admission as he might wish. All the evidence offered by the said applicant was received by said officer and by his examining officers designated for that purpose, and, after full consideration of all the evidence so offered, it was, on November 5, 1904, adjudged by the said officer that the said Ju Toy was a Chinese alien, and was not born in the United States, and was not entitled under any law to enter or remain therein, *and was not entitled under any law to enter or remain therein*, and he was accordingly ordered to be deported to China, whence he came. On November 7, 1904, the said Ju Toy took an appeal from the decision of said officer to the Secretary of Commerce and Labor, whereupon said officer forwarded to the Commissioner-General of Immigration all the evidence, affidavits, statements, and briefs submitted on the hearing of the application, accompanied by his views thereon in writing, for the submission of said appeal to the Secretary of Commerce and Labor. Upon consideration thereof the Secretary of Commerce and Labor, on December 13, 1904, approved the action of said North as such officer, and dismissed the said appeal. On December 29, 1904, a petition for writ of habeas corpus was presented in behalf of said Ju Toy to the Honorable J. J. De Haven, judge of the district court of the United States for the northern district of California, which is as follows:

"In the district court of the United States, northern district of California.

"In re Ju Toy, #36, S. S. "Doric," on habeas corpus. Petitioner's picture.

"Petition for writ of habeas corpus and order allowing same.

"To the Honorable J. J. De Haven, judge of the district court of the United States, northern district of California:

"The petition of the undersigned respectfully shows:

"That Ju Toy is unlawfully imprisoned, detained, confined, and constrained of his liberty by the general manager of the O. and O. Steamship Company, in the city and county of San Francisco, State of California, northern district of California.

"That the imprisonment, detention, confinement, and constraint aforesaid are illegal, and the illegality thereof consists in this, to wit: That it is claimed by the said general manager of the above-mentioned steamship company that the said passenger is a subject of the Emperor of China, and must not and can not be allowed to land under the
3 provisions of the act of Congress of May 6th, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," and the acts amendatory thereof and supplemental thereto.

"That said passenger does not come within the restrictions of said act, but on the contrary your petitioner alleges that said passenger was a resident of the United States and departed therefrom temporarily; that said passenger is a native-born citizen of the United States, having been born in San Francisco, State of California, at # Dupont street, on or about 1882.

"That he has applied to the collector of the port of San Francisco to be permitted to land, but said application was denied.

"That your petitioner prays that a writ of habeas corpus may be granted, directed to the said general manager of the said steamship company, commanding him to have the body of said passenger before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, and together with the time and cause of his detention, and the said writ, and that he may be restored to his liberty.

"Dated San Francisco, California, Dec. 28, 1904.

"(Signature in Chinese) *Petitioner.*

"STATE OF CALIFORNIA,

"*City and County of San Francisco, Northern District of California, U. S. A., ss:*

"The undersigned being sworn says: That he is the petitioner above named; that he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge; that he resides and does business at 31 Waverly Pl., San Francisco, California.

(Signature in Chinese.)

"Subscribed and sworn to before me this 29 day of Dec., 1904.

"J. S. MANLEY,

"*United States Commissioner for the Northern District of California, at San Francisco.*

Attached to said petition for writ of habeas corpus was a certified copy of the order of the Department of Commerce and Labor dismissing the appeal taken by said Ju Toy from the action of said North, in adjudging

that said Ju Toy was a Chinese alien, and was not born in the United States, and was not entitled under any law to enter or remain therein.

On said petition the writ of habeas corpus so prayed for was on December 29, 1904, duly issued from said court, and thereafter Marshall B. Woodworth, attorney for the United States for said district, appearing on behalf of the United States, made answer to the writ as follows:

4 "That during all the times hereinafter stated H. H. North was and now is the duly appointed, qualified, and acting officer of the United States in charge of the enforcement of the Chinese exclusion laws at the port of San Francisco, in the State and northern district of California, appointed as such by the Secretary of Commerce and Labor, under authority of the act of Congress of February 14, 1903 (30 Stat., 825), and acting under the direction of the Commissioner-General of Immigration as provided in the act of Congress of June 6, 1900 (31 Stat., 611).

"That on the 24th day of October, 1904, the said Ju Toy, being a Chinese person and having immediately come from the Empire of China on the steamship "Doric" to the said port of San Francisco, said port being a port of entry for Chinese immigrants, declared such by section 7 of the act of Congress of September 13, 1888 (25 Stat., 476), made application in person to the said North, as such officer aforesaid, to be admitted to the United States, claiming the right to be admitted.

"Thereupon the said detained Ju Toy was given full opportunity by the said officer to make such voluntary statement in support of his right to be admitted into the United States as he might desire, and also to produce such witnesses and to offer such other proof in support of his claimed right to admission as he might wish to offer, and the testimony of all persons whose names were given the said officers by the said detained or by any person for him, as witnesses in his behalf, was taken, as well as all other evidence brought to the attention of the said officers.

"That all the evidence offered by the said detained was duly received by the said North as said officer, and by his examining officers designated for that purpose; and, after full consideration of all the evidence offered upon such application, it was on the 5th day of November, 1904, adjudged by the said officer that the said detained was an alien Chinese person, not born in the United States, and not entitled under any law to enter or remain therein; and that the master of said steamship "Doric" should return the said Ju Toy to the country from whence he brought him, who now holds the said detained in his custody for deportation to China by virtue of such order.

"On the 7th day of November, 1904, the said North, as such officer, advised the said detained of his action in denying him admission to the United States, and then advised him of his right to take an appeal from such decision to the Secretary of Commerce and Labor.

"In pursuance of such notification, the said detained, on the 7th day of November, 1904, took an appeal from the decision of said officer so denying him admission to the United States to the Secretary of Commerce and Labor.

"Thereupon the said North, acting as such officer aforesaid, duly forwarded to the Commissioner-General of Immigration, all the evidence,

affidavits, statements, and briefs submitted upon the hearing of the application, accompanied by his views thereon in writing, for the submission of the said appeal to the Secretary of Commerce and Labor.

"Upon full consideration of the appeal, the Secretary of Commerce and Labor, on the 13th day of December, 1904, approved the action of the said North, as such officer, in denying the said detained admission to the United States, and in ordering that the said detained be returned to the country from whence he came by the steamship company so bringing him to the United States, and dismissed his said appeal; of all of which the said detained was promptly advised.

5 "A duly certified copy of all the evidence offered upon the hearing of the application of the said detained for admission to the United States, together with a certified copy of all orders made therein by said North, acting as such officer, and by the Secretary of Commerce and Labor, is attached to and made a part of this return and answer, and marked 'Exhibit A.'

"The undersigned avers that the said North, as such officer, in the hearing and determination of the application of the said detained for admission to the United States, and the Secretary of Commerce and Labor in the hearing and determination of the said appeal therefrom, acted in all things in full conformity with the acts of Congress governing the admission of Chinese persons or persons of Chinese descent into the United States and the rules and regulations duly promulgated thereunder.

"That among the regulations promulgated by the Secretary of Commerce and Labor and the Commissioner-General of Immigration governing the admission of Chinese persons into the United States are the following:

"'Rule 6. Immediately upon the arrival of Chinese persons at any port mentioned in rule 4, it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their right to admission, and to permit those proving such right to land.

"'Rule 7. The examination prescribed in rule 6 should be separate and apart from the public, in the presence of Government officials, and such witness or witnesses only as the examining officer shall designate; and, if upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal, and his counsel should be permitted, after duly filing notice of appeal, to examine, but not to make copies of, the evidence upon which the excluding decision is based.

"'Rule 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

"'Rule 9. Notice of appeal provided for in rule 8 shall act as a stay upon the disposal of the Chinese person whose case is hereby affected until a final decision is rendered by the Secretary; and, within three days after the filing of such notice, unless further delay is required to

investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner-General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge.

"'Rule 21. The burden of proof in all cases rests upon the Chinese persons claiming the right of admission to, or residence within, the United States, to establish such right affirmatively and satisfactorily to the appropriate Government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States Government.'

6 "The undersigned, upon information and belief, therefore denies that the above-named detained was born in the United States, and denies that he is a citizen thereof; avers that the said detained is an alien and a Chinese laborer not entitled, under any law, to be admitted into the United States, and that the holding and detention of the said detained by the the master of the steamship 'Doric' by direction of the said North, as such officer aforesaid, for deportation to China, is under, by virtue of, and in conformity with, the laws and authority of the United States of America.

"The undersigned, further answering the petition, denies each and every allegation thereof not herein specifically admitted."

(Then followed prayer that said Ju Toy be remanded to the custody of the master of the vessel from which he was taken for deportation to the country whence he came.)

Attached to said return and answer and designated as Exhibit A was a certified copy of all the proceedings and evidence had before H. H. North as commissioner of immigration at the port of San Francisco, and of his examining officers, and of the Department of Commerce and Labor, in the matter of the application of Ju Toy for admission into the United States.

No traverse to said return and answer was made by said Ju Toy, and on December 31, 1904, the United States attorney for said district made and filed a motion to dismiss the writ of habeas corpus which had theretofore been issued. This motion to dismiss the writ was as follows:

"Having made full and correct answer to the writ in this, its return thereto, upon the leave given to intervene, the United States now moves the court to dismiss the writ of habeas corpus issued herein, upon its answer and return as above made, for the following reasons:

"1. The answer and return to the United States upon its face shows that the said North, as such officer, and the Secretary of Commerce and Labor, in all things acted within the authority conferred upon them by law and by the regulations of the Department of Commerce and Labor, duly promulgated thereunder; and, having so acted, the determination of those officers upon the questions of fact committed to them by law is made final, and those questions of fact can not be retried by this court upon a writ of habeas corpus.

"2. The court has no jurisdiction to review the finding of the immigration officer and of the Secretary of Commerce and Labor that the said Ju Toy is a Chinese person, and a person of Chinese descent, and that he was not born in the United States.

7 "3. The petition, the return by the master of the steamship 'Doric,' and the return and answer of the United States, filed in pursuance of its leave to intervene, show that the said detained has no legal right to enter or to remain in the United States.

"4. That the said detained is not unlawfully detained or deprived of his liberty."

The motion to dismiss the writ of habeas corpus was denied by Honorable J. J. De Haven, judge of the district court of the United States for the northern district of California, on December 31, 1904; and thereafter the United States attorney, on January 6, 1905, made and filed a supplemental motion to dismiss the writ of habeas corpus theretofore issued, which supplemental motion was as follows:

"Having made full and correct answer to the writ in its return thereto, upon leave given to intervene, the United States now moves the court to dismiss the writ of habeas corpus issued herein, upon its answer and return as heretofore made, for the following reasons:

"1. The petition fails to allege and show that upon the case presented for their determination the immigration officers abused the discretion vested in them by law, or that their action was unlawful, or that any error prejudicial to the detained Ju Toy was committed.

"2. It does not appear from the return and answer made to the writ that the immigration officers, or the Secretary of Commerce and Labor, acted in violation of the authority conferred upon them by law, or that upon the case submitted to them abused their discretion, or acted unlawfully, or committed any error prejudicial to the detained Ju Toy.

"3. The judgments and rulings of the immigration officers excluding the detained Ju Toy, affirmed on appeal to the Secretary of Commerce and Labor, should be treated by this court as final and conclusive of the questions involved, since it does not affirmatively appear from the whole record that those officers, in the case submitted to them, acted in an unwarranted way, abused their discretion, or committed any error prejudicial to the interest of the detained Ju Toy, and said Ju Toy is not therefore unlawfully deprived of his liberty.

"4. The petition, return, and answer show that the detained Ju Toy has no legal right to enter or remain in the United States and is not unlawfully deprived of his liberty.

"5. There is nothing in the record to show that the detained Ju Toy is unlawfully deprived of his liberty or that he has been unlawfully denied admission to the United States, or that he has a right to enter and remain therein."

8 The supplemental motion to dismiss was, on January 6, 1905, denied by Honorable J. J. De Haven, judge of the district court of the United States for the northern district of California, to which rulings and orders the United States duly excepted.

Thereafter, upon the issues made, testimony of witnesses was taken, on January 18, 1905, before a special referee and examiner, to whom the matter had been theretofore referred by the court, to hear the testimony,

ascertain, determine, and report to the court the facts and his conclusions of law thereon, and recommend such judgment as in his opinion ought to be entered therein. The United States attorney objected to the testimony of each and every witness, and to the offering, or the receiving, of any evidence, on the following grounds:

"As Congress has vested in the immigration officers the power finally to determine the facts with respect to the right of Chinese persons to be admitted into the United States, and as the proper immigration officers have found that this applicant for admission was not born in the United States, and was not entitled to be admitted therein, the Government objects to the offering or the receiving at this stage of the hearing of any evidence except such as is offered for the purpose of impeaching the returns or answers filed herein and of showing such wrongful action on the part of the immigration officers as would amount to a denial of a fair hearing to the applicant and render their proceedings void. Until such illegality of action be shown, the Government insists that this court is without power to ignore the action of the proper immigration officers and to retry the questions of fact, the finding of those officers on the questions of fact being conclusive in the matter.

"The Government also repeats the same objections to the introduction of this testimony as were urged in the motion to dismiss the writ, on the grounds:

"1. That the answer and return of the United States upon its face shows that the said H. H. North, as such immigration officer, and the Secretary of Commerce and Labor, in all things acted within the authority conferred upon them by law and by the regulations of the Department of Commerce and Labor duly promulgated thereunder; and, having so acted, the determination of those officers upon the questions of fact committed to them by law is made final, and is not subject to review by this court upon a writ of habeas corpus.

"2. That the court has no jurisdiction to review the finding
9 of the immigration officer and of the Secretary of Commerce and Labor that the said Ju Toy is a Chinese person of Chinese descent, and that he was not born within the United States.

"3. That the petitioner fails to allege and show that upon the case presented for their determination the immigration officers abused the discretion given them by law, or that their action was unlawful, or that any error prejudicial to the petitioner was committed; therefore, the writ should not have been originally granted and should now be dismissed.

"4. That it does not appear from the returns and answers made to the writ that the immigration officers, or the Secretary of Commerce and Labor, acted in violation of the authority conferred upon them by law, or that upon the case submitted to them, abused their discretion, acted unlawfully, or committed any error prejudicial to the petitioner; therefore the petitioner is not unlawfully detained, and the writ should have been dismissed and should now be dismissed.

"5. That the judgment and rulings of the immigration officers excluding petitioner, affirmed on appeal to the Secretary of Commerce and Labor, should be treated by this court as final and conclusive of the questions involved, since it does not affirmatively appear from the whole record

that those officers, in the case submitted to them, acted in an unwarranted way, abused their discretion, or committed any prejudicial error against the interest of petitioner; therefore petitioner is not unlawfully deprived of his liberty, and the writ should be dismissed.

"6. That the petition, returns, and answers show that the petitioner has no legal right to enter or remain in the United States, and is not unlawfully deprived of his liberty, and the writ should be dismissed.

"7. That there is nothing to show that the petitioner is unlawfully deprived of his liberty or that he has been unlawfully denied admission to the United States, or that he has a right to enter and remain therein; therefore the writ should be dismissed."

The special referee and examiner overruled the objections, to which the United States attorney duly excepted.

Motions were also made by the United States attorney at the conclusion of the testimony of each and every witness to strike out the testimony of the witness from the record, as follows:

"The Government now moves to strike from the record the testimony of this witness, for the reason that it does not tend to impeach the returns or answers filed herein, nor does it tend to show any illegal action on the part of the immigration officers in trying and deciding the question as to the country of birth of the applicant, and for the several reasons urged in the objections of the Government to the introduction of this testimony."

which motions were denied by the special referee and examiner, to which rulings the United States attorney duly accepted.

10 On January 19, 1905, the special referee and examiner reported to the district court of the United States for the northern district of California, all the testimony taken and his findings of fact and conclusions of law, and found from said testimony that said Ju Toy was born in the United States and was a citizen thereof, and recommended to said court that he be discharged from custody, to which report and recommendation the United States attorney took an exception.

Thereafter, on January 19, 1905, said exceptions to said report of said special referee and examiner came up for hearing in the district court of the United States for the northern district of California, and said exceptions taken by the United States attorney were overruled by the court, and the court thereupon rendered judgment that said Ju Toy was illegally restrained of his liberty, as alleged in the petition for the writ, and that he be, and was, thereby discharged from the custody from which he was produced, and that he should go hence without day.

On January 20, 1905, an appeal from that order was taken by the United States to this court, the appellant making the following assignments of error:

"1. That the court erred in undertaking to review the determination of the immigration officers of the United States and of the Department of Commerce and Labor, denying petitioner the right to enter and remain within the United States.

"2. That the court erred in holding that the determination of the immigration officers of the United States and of the Department of Commerce and Labor, denying petitioner the right to enter and remain within the United States was not final and conclusive as to all questions of fact.

"3. That the court erred in overruling the motions of the United States to dismiss the writ of habeas corpus herein, for the reasons specified therein.

"4. That the court erred in not holding that the matters and things stated in the returns and answers of the United States to the writ were sufficient to authorize the court to dismiss the writ of habeas corpus herein.

"5. That the court erred in overruling the several objections and exceptions of the United States taken at the hearing and to the report of the special referee and examiner recommending that petitioner be discharged and be admitted and remain within the United States.

11 "6. That the court erred in undertaking to retry and determine whether or not the petitioner was a Chinese person of Chinese descent, and was or was not a citizen of the United States, after said matters had been fully presented by petitioner and heard, and proofs taken before, and said matters determined by the immigration officers of the United States and of the Department of Commerce and Labor, which said immigration officers of the United States and the Department of Commerce and Labor denied the petitioner the right to enter and remain within the United States on the ground that he was not born in the United States and is not a citizen thereof.

"7. That the court erred in holding that petitioner was denied due process of law in the proceedings before the immigration officers of the United States and of the Department of Commerce and Labor, before whom he claimed that he had a right to enter and remain in the United States because he was born therein and is a citizen thereof, and before whom he presented proofs in that behalf, and by whom he was adjudged not to have been born in the United States and not to be a citizen thereof, and not to be lawfully entitled to enter and remain therein.

"8. That the court erred in not holding that the acts of Congress vesting in the immigration officers of the United States and the Department of Commerce and Labor power to decide questions in dispute with regard to the rights of Chinese persons to enter the United States, and enacting that the decision of the immigration officers of the United States shall be subject to review by the Secretary of Commerce and Labor and not otherwise, were constitutional in their application to all Chinese persons, whether born in the United States or not.

"9. That the court erred in overruling the objections and exceptions of the United States to the introduction of any evidence except such as might be offered for the purpose of impeaching the returns and answers to the writ of habeas corpus, or of showing such illegal action on the part of the immigration officers as would amount to a denial of a fair hearing to the applicant or render their proceedings void; and in overruling the motions of the United States to strike from the record all testimony offered and received in evidence over its objections and exceptions.

"10. That the court erred in not holding that the petition was insufficient in not alleging and showing that upon the case presented for their determination the immigration officers or the Secretary of Commerce and Labor abused the discretion given them by law, or that their action was unlawful, or that some error prejudicial to the petitioner was committed.

"11. That the court erred in not holding that, as it does not appear from the returns and answers made to the writ that the immigration officers, or the Secretary of Commerce and Labor, acted in violation of the authority conferred upon them by law, or that upon the case submitted to them abused their discretion, or committed any error prejudicial to the petitioner, he was not unlawfully detained or deprived of his liberty, and that the writ should have been dismissed.

"12. That the court erred in not holding that the judgments and rulings of the immigration officers excluding the petitioner, affirmed on appeal to the Secretary of Commerce and Labor, should be treated
12 by it as final and conclusive of the question of fact involved, since it does not affirmatively appear from the whole record that those officers, in the case submitted to them, acted in an unwarranted way, abused their discretion, or committed any prejudical error against the interest of the petitioner.

"13. That the court erred in not holding that the petition, return, and answers showed that the petitioner has no legal right to enter and remain in the United States, and is not unlawfully deprived of his liberty."

The said appeal came on to be heard in this court on the 13th day of February, 1905, the appellant appearing by Marshall B. Woodworth, esq., United States attorney, and the appellee by O. P. Stidger, esq., and the respective parties submitted to the court the questions involved in the assignments of error in said cause.

Upon the foregoing statement the questions of law concerning which this court desires the instruction of the Supreme Court, are:

First. Should a district court of the United States grant a writ of habeas corpus in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who having recently arrived at a port of the United States made application to land as a native-born citizen thereof and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United
13 States and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

Second. In a habeas corpus proceeding should a district court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers who found he was not born in the United States, that his application for admission was considered and denied by

such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

Third. In a habeas corpus proceeding in a district court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein upon the ground that he was a native-born citizen thereof but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of
14 fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?

(Endorsed:) Certificate under section 6 of act of March 3, 1891. Filed and entered February 14th, 1905. F. D. Monckton, clerk.

15 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
JU TOY, APPELLEE. } No. 1164.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing fourteen (14) pages, numbered from one (1) to fourteen (14), inclusive, to be a true copy of a certificate of the United States circuit court of appeals for the ninth circuit, certifying certain questions or propositions of law to the Supreme Court of the United States for its decision under section 6 of the act of March 3, 1891, as the original certificate remains on file and of record in my office.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 14th day of February, A. D. 1905.

[SEAL.] F. D. MONCKTON, *Clerk.*

16 (Indorsed:) Office of the clerk, Supreme Court U. S. Received Feb. 20, 1905.

17 (Indorsement on cover:) Certificate. File No. 19635. U. S. circuit court appeals, 9th circuit. Term No. 535. The United States *vs.* Ju Toy. Filed February 20th, 1905. File No. 19635.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
JU TOY, APPELLEE.
No. 535.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the United States, respectfully moves that the above-entitled cause be advanced on the docket and assigned for hearing during the present term at as early a day as the convenience of the court will permit.

This is a *habeas corpus* case instituted in behalf of a Chinaman seeking admission wherein the writ was granted after appeal to the Secretary upon a bare allegation of citizenship and a new trial on questions of fact was granted. It is here upon a request for instructions submitted by the circuit court of appeals for the ninth circuit.

The questions propounded are designed to ascertain the effect which should be given in *habeas corpus* proceedings to the action of executive officers who

have denied admission into the United States to a person of Chinese descent claiming birth therein, when such officers have found that claim to be false, and upon appeal to the Secretary of Commerce and Labor their action has been affirmed. They follow—

Question 1. Should a district court of the United States grant a writ of *habeas corpus* in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who having recently arrived at a port of the United States made application to land as a native-born citizen thereof and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts because born in and a citizen of the United States, and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

Question 2. In a *habeas corpus* proceeding should a district court of the United States dismiss the writ, or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that

country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers, who found he was not born in the United States; that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

Question 3. In a *habeas corpus* proceeding in a district court of the United States, instituted in behalf of a person of Chinese decent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States, and who applied for admission therein upon the ground that he was a native-born citizen thereof, but who, after a hearing, the lawfully designated immigration officers found was not born therein, and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed, should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive, unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or in some other

way in hearing and determining the same committed prejudicial error?

At the last term the case of *The United States* v. *Sing Tuck* (164 U. S., 161) was brought here by certiorari, advanced upon the docket and heard. In that case a writ of *habeas corpus* was originally allowed in behalf of a Chinese person claiming birth in the United States who had been denied admission by immigration officers, upon a bare allegation of citizenship and before appeal to the Secretary of Commerce and Labor. It was then pointed out that the action of Chinese seeking admission by means of *habeas corpus* proceedings and new trials in court of all matters of fact was swamping the courts with fraudulent litigation and rendering proper enforcement of the exclusion laws impossible. The judgment of the trial court dismissing the writ upon motion made after a return showing action of the officers upon application to enter was sustained by this court in an opinion by Mr. Justice Holmes, in the course of which he said (p. 170):

> We are of opinion that the attempt to disregard and override the provisions of the statutes and the rules of the Department and to swamp the courts by a resort to them in the first instance must fail. We may add that, even if it is beyond the power of Congress to make the decision of the Department final upon the question of citizenship, we agree with the circuit court of appeals that a petition for *habeas corpus* ought not to be entertained unless the court is satisfied that the petitioner can make out at least

> a *prima facie* case. A mere allegation of citizenship is not enough; but, before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide.

Since the decision in the *Sing Tuck* case the former plan of Chinese seeking admission because of alleged birth in this country has been modified by interposing formal appeals from the action of the immigration officers to the Secretary of Commerce and Labor; and when such appeals are overruled they sue out writs of *habeas corpus* upon mere allegations of citizenship as formerly and then demand entirely new trials upon that question before the court. There have been very many such cases during the last year at San Francisco wherein, as in the present case, the United States district court granted the writs as of course, refused to dismiss them upon returns showing full investigation by immigration officers, and permitted entirely new trials upon the question of citizenship without reference to proof or record before those officers.

The present situation differs from the former one in that a formal appeal is now made to the Secretary of Commerce and Labor before the writs are sued out. The last plan requires a little more time than the old one, but manifestly is open to the same objections and abuses.

The orderly administration of the Chinese-exclusion law, where citizenship is claimed, remains impossible

under the repeated rulings of the district court at San Francisco. The transparent device of taking a formal appeal to the Secretary of Commerce and Labor has been permitted to destroy the effect of the opinion and judgment of this court in the *Sing Tuck* case and to render the investigation by and the action of the immigration officers of no avail—makes them, indeed, little short of farcical.

The courts in California are flooded with cases of the kind above described and their immediate relief is exceedingly desirable.

The questions submitted by the circuit court of appeals have been carefully framed in order to secure an authoritative opinion from this court on the fundamental principles involved. The Government regards it as highly important to know whether the action and findings of immigration officers are of any effect when the applicant for admission chooses to allege citizenship. An early decision will be of great assistance in administering the Chinese exclusion laws and also the general immigration laws under which the same questions may at any time arise. And it will secure prompt disposition of many cases now pending.

I respectfully submit that the case merits the consideration of the court at an early day during the present term.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES
v.
JU TOY. } No. 535.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Ju Toy, a person of Chinese descent, came directly from China to San Francisco on the steamship *Doric*. In October, 1904, he made application to the officer charged with enforcing the Chinese-exclusion acts for admission into the United States, claiming citizenship because born therein. Opportunity was given him to make a voluntary statement, and all offered evidence in his behalf was received. After consideration of the facts, the officer decided Ju Toy was a Chinese alien not entitled under any law to enter or remain within the United States. He accordingly refused permission to land, and ordered the applicant returned to China

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by the steamship company which brought him therefrom. The Secretary of Commerce and Labor, upon appeal to him, approved the order. (R., 1.)

After such action by the Secretary Ju Toy presented a petition for a writ of *habeas corpus* to the United States District Court at San Francisco, wherein he alleged detention by the manager of the steamship company and

> That the imprisonment, detention, confinement, and constraint aforesaid are illegal, and the illegality thereof consists in this, to wit: That it is claimed by the said general manager of the above-mentioned steamship company that the said passenger is a subject of the Emperor of China, and must not and can not be allowed to land under the provisions of the act of Congress of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," and the acts amendatory thereof and supplemental thereto.
>
> That said passenger does not come within the restrictions of said act, but on the contrary your petitioner alleges that said passenger was a resident of the United States and departed therefrom temporarily; that said passenger is a native-born citizen of the United States, having been born in San Francisco, State of California, at —— Dupont street, on or about 1882.
>
> That he has applied to the collector of the port of San Francisco to be permitted to land, but said application was denied. (R., 2.)

Attached to the petition was a copy of the order of the Secretary dismissing the appeal.

The petition did not allege or show that petitioner was deprived of a fair hearing or that the immigration officer acted in an unwarranted way, or abused the discretion given him by law. It was based upon a mere allegation of citizenship by birth.

The writ was issued, and thereupon the district attorney, in behalf of the Unied States, interposed and answered, setting up all the facts relating to petitioner's arrival, the application for landing, the hearing thereon and denial thereof by the immigration officer, the appeal to the Secretary of Commerce and Labor and his action, and exhibited a copy of all evidence offered upon the hearing and the orders by the officer and the Secretary. No traverse of the answer and return was made and its statements were not questioned.

A motion was made to dismiss the writ because (R., 6)—

> 1. The petition fails to allege and show that upon the case presented for their determination the immigration officers abused the discretion vested in them by law, or that their action was unlawful, or that any error prejudicial to the detained Ju Toy was committed.
>
> 2. It does not appear from the return and answer made to the writ that the immigration officers, or the Secretary of Commerce and Labor, acted in violation of the authority conferred upon them by law, or that upon the case submitted to them abused their discretion, or acted unlawfully, or committed any error prejudicial to the detained Ju Toy.

3. The judgments and rulings of the immigration officers excluding the detained Ju Toy, affirmed on appeal to the Secretary of Commerce and Labor, should be treated by this court as final and conclusive of the questions involved, since it does not affirmatively appear from the whole record that those officers, in the case submitted to them, acted in an unwarranted way, abused their discretion, or committed any error prejudicial to the interest of the detained Ju Toy, and said Ju Toy is not therefore unlawfully deprived of his liberty.

4. The petition, return, and answer show that the detained Ju Toy has no legal right to enter or remain in the United States and is not unlawfully deprived of his liberty.

5. There is nothing in the record to show that the detained Ju Toy is unlawfully deprived of his liberty or that he has been unlawfully denied admission to the United States, or that he has a right to enter and remain therein.

The motion to dismiss was overruled and the cause referred to a special referee to take evidence upon the issues. The Government objected to the introduction of any testimony, claiming the questions of fact had been passed upon by officers authorized to determine them, and that in the absence of an allegation impeaching or in some way assigning error to their action no further proceedings should be allowed. No witness was offered in its behalf.

The referee reported the testimony and his finding therefrom that Ju Toy was born in the United States and a citizen thereof. Thereupon the court adjudged

the petitioner was illegally restrained and discharged him from custody.

An appeal was taken to the Circuit Court of Appeals and, to enable it to decide the cause and dispose of many similar ones now pending, it has certified the following questions of law concerning which instructions are desired (R., 10, 11):

> First. Should a district court of the United States grant a writ of *habeas corpus* in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who having recently arrived at a port of the United States made application to land as a native-born citizen thereof, and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court, and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?
>
> Second. In a *habeas corpus* proceeding should a district court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented where the

writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

Third. In a *habeas corpus* proceeding in a district court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein upon the ground that he was a native-born citizen thereof but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact

> as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or in some other way in hearing and determining the same committed prejudicial error?

The act of Congress, February 14, 1903 (32 Stat., 825), created the Department of Commerce and Labor, intrusted to it (section 4) enforcement of the Chinese exclusion acts, and (section 7) imposed upon the Secretary the duties and powers relating thereto formerly exercised by the Secretary of the Treasury. It further provided (section 7):

> That * * * the authority, power, and jurisdiction in relation thereto [the Chinese exclusion acts] now vested by law or treaty in the collectors of customs and the collectors of internal revenue are hereby conferred upon and vested in such officers under the control of the Commissioner-General of Immigration as the Secretary of Commerce and Labor may designate therefor.

The following from the sundry civil appropriation act of August 18, 1894 (28 Stat., 390), is in effect:

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury.

The fundamental question involved is what effect the courts should give in *habeas corpus* proceedings to the action of executive officers where a Chinese person has asked admission alleging citizenship and has been excluded because they held the claim not well founded, when there is no allegation or proof of erroneous or wrongful action by such officers.

The Government maintains that Congress has imposed upon executive officers, as a special tribunal, the duty to pass upon the admission into the United States of Chinese persons applying therefor upon any ground, and that their findings on questions of fact are conclusive unless properly impeached for fraud, misconduct, or some unwarranted action upon their part in the proceeding before them.

It is maintained in behalf of the Chinese—and this seems to have been sustained by the district court—that when entry into the United States sought upon a claim of citizenship by birth has been finally denied on appeal to the Secretary of Commerce and Labor the applicant is entitled of right, upon a petition merely alleging unlawful imprisonment and such citizenship, to a writ of *habeas corpus* and an entirely new trial of the issues before the court, without reference to proceedings before executive officers.

The Government seeks to give some effect to the action of immigration officers taken in pursuance of law.

The proposition advanced in behalf of the Chinese amounts to this: Where proceedings before executive

officers result in excluding the applicant, upon *habeas corpus* they should be disregarded and an entirely new trial awarded whenever citizenship is alleged.

ARGUMENT.

I.

Congress by constitutional enactments has entrusted to executive officers as a special tribunal determination of all questions of fact—including a claim of citizenship—relating to the right of entry into the United States of Chinese applying therefor; and a bare allegation of citizenship is not enough to support a petition for habeas corpus by one denied admission.

In *United States* v. *Sing Tuck* (194 U. S., 161, 168, 170), certain Chinese just arrived from China claimed the right to enter because of birth and citizenship. They refused to produce evidence in support of their contentions when brought before the immigration officer, and denied his jurisdiction to pass upon the questions in issue because of their claim. Admission having been denied, writs of *habeas corpus* were sued out and trials of all questions by the court demanded as of right. The writs were dismissed.

Mr. Justice Holmes, in behalf of the court, said:

> (168) Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way.
>
> (170) We are of opinion that the attempt to disregard and override the provisions of

> the statutes and the rules of the Department and to swamp the courts by a resort to them in the first instance must fail. We may add that, even if it is beyond the power of Congress to make the decision of the Department final upon the question of citizenship, we agree with the Circuit Court of Appeals that a petition for *habeas corpus* ought not to be entertained, unless the court is satisfied that the petitioner can make out at least a *prima facie* case. A mere allegagation of citizenship is not enough. But before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide.

The opinion and judgment in *United States* v. *Sing Tuck* settled the following propositions:

A Chinaman seeking admission into the United States because of alleged birth therein must in the first instance submit his claim to the determination of immigration officers. Such officers have a right to decide upon all questions of fact, including that of citizenship. The applicant may not ignore them and appeal directly to the courts for determination of his rights. A writ of *habeas corpus* should not be granted until he has prosecuted an appeal to the Secretary of Commerce and Labor as provided by the statute. After the Secretary has, upon appeal, affirmed the action of immigration officers excluding a Chinaman a petition for *habeas corpus* should not be entertained unless the court is satisfied petitioner can make out a

prima facie case; a mere allegation of citizenship is not enough.

Referring to the situation which would arise after final rejection by the Secretary, the court declined to say "whether upon a petition showing reasonable cause there ought to be a further trial upon *habeas corpus*."

In behalf of Sing Tuck it was earnestly insisted that a claim of citizenship is a judicial question, determination of which is granted exclusively to the courts by article 3, section 2, of the Constitution, and Congress has no power to entrust it to executive officers; and, moreover, to require an applicant for admission to submit such a claim to an immigration officer would violate the prohibition of the Fifth Amendment that no person shall be deprived of his liberty without due process of law.

In *Lem Moon Sing* v. *United States* (158 U. S., 538, 546), it was alleged the petitioner had acquired a domicile in the United States, and counsel maintained that to permit executive officers to pass on his right to return thereto would deprive him of his liberty without due process of law. Mr. Justice Harlan, in behalf of the court, said:

> The contention is that while, generally speaking, immigration officers have jurisdiction under the statute to exclude an alien who is not entitled under some statute or treaty to come into the United States; yet if the alien is entitled of right, by some law or treaty, to enter this coun-

try, but is nevertheless excluded by such officers, the latter exceed their jurisdiction; and their illegal action, if it results in restraining the alien of his liberty, presents a judicial question for the decision of which the courts may intervene upon a writ of *habeas corpus*.

That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the Government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the *class* entitled by some law or treaty to come into the country, or to a *class* forbidden to enter the United States. Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be *final*, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value.

Chin Bak Kan v. *United States* (186 U. S., 193, 200) was a proceeding before a commissioner to deport a Chinaman within the United States. Counsel strongly insisted that the commissioner had no jurisdiction, because of the claim of citizenship. They said (brief, p. 25):

We accordingly submit that the question of American citizenship can not be lawfully left for determination in this class of cases to an

inferior magistrate like a United States commissioner not holding a court of record, not exercising any part of the "judicial power of the United States" (Const., art. 3, sec. 1; *Robertson* v. *Baldwin*, 165 U. S., 275) in proceedings in which there is no authority to secure the appearance of witnesses or otherwise secure due process of law.

The court, by Mr. Chief Justice Fuller, replying to contention of counsel, said:

> But it is argued that the commissioner had no jurisdiction to act because the claim of citizenship was made. The ruling in *United States* v. *Wong Kim Ark* (169 U. S., 649) was to this effect: "A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States." It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision.
>
> By the law the Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens there is no question of the validity of that provision, and

the treaty, the legislation, and the circumstances considered, compliance with its requirements can not be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.

In *The Japanese Immigrant Case* (189 U. S., 86, 97, 100), Mr. Justice Harlan, for the court, said:

(97) That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court.

(100) It has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country or remain in it depended, was "due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to

controvert its sufficiency." * * * But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.

Murray's Lessee et al. v. *Hoboken Land and Improvement Company* (18 How., 272, 280, 282). Opinion by Mr. Justice Curtis.

(280) For, though "due process of law" generally implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, * * * yet this is not universally true. There may be, and we have seen that there are cases, under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings

us to the question whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. (*United States* v. *Ferreira*, 13 How., 40.) It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But, until reviewed, it is final and binding; and the question is, Whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy? And we are of opinion it is not. * * *

> (282.) It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

In *Springer* v. *United States* (102 U. S., 586, 594), the collector of internal revenue issued a warrant for assessed tax and penalty, which was levied on certain real estate and the same sold without judicial action. The owner claimed the proceedings deprived him of property without due process of law. The court held the contention not well founded and, by Mr. Justice Swayne, said:

> The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make Congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the Government.

Hilton & Another v. *Merritt, Collector* (110 U. S., 97, 107).

Robertson v. *Baldwin* (165 U. S., 275, 279).

In *Fong Yue Ting* v. *United States* (149 U. S., 698, 713, 714), Mr. Justice Gray, in behalf of the court, said:

> The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. * * *
>
> It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.
>
> For instance, the surrender, pursuant to treaty stipulations, of persons residing or found in this country and charged with crime in another may be made by the executive authority of the President alone when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate. * * *
>
> So claims to recover back duties illegally exacted on imports may, if Congress so provides, be finally determined by the Secretary of the Treasury.

Public Clearing House v. *Coyne* (194 U. S., 497, 508).

> It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. * * * That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations.

Bushnell v. *Leland*, 164 U. S., 684, 685.

The direct course of all the later decisions, both English and American, is to establish the rule that probable cause must first be shown to obtain the writ of *habeas corpus*, whether it be granted at common law or under the statute.

> Church on Habeas Corpus, sec. 92.
> *Ex parte Watkins*, 3 Peters, 193.
> *Ex parte Milligan*, 4 Wall., 2, 110.
> *Ex parte Royall*, 117 U. S., 250.
> *Ex parte Terry*, 128 U. S., 301.

II.

Where the law has confided to a special tribunal authority to hear and determine matters arising in the course of its duties, a decision by it within the scope of its authority as to questions of fact is conclusive against collateral attack.

And where the jurisdiction depends upon a question of fact which is the very gist of the controversy, the determination of that is generally final.

Since the *Sing Tuck* case it is plain that a Chinaman seeking admission upon the ground of citizenship must submit his claim with evidence to sustain it to execu-

tive officers and that they have jurisdiction to pass primarily upon all matters. The point now presented is whether all the proof must be first offered before those officers and what effect the courts shall give to judgments by them. Must the applicant lay before them the real case upon which he relies? And is their finding entitled to the weight and respect usually accorded the determination of a special tribunal, or is it only an idle ceremony made necessary by solemn adjudication, but without consequence when completed?

In *Gonzales* v. *Williams* (192 U. S., 1) the executive officers wrongfully decided a point of law upon conceded facts, and this was alleged upon application for the writ. The return supported the petition and the court held the petitioner was entitled to immediate relief upon *habeas corpus*—matters of law being for its determination. There, from the record, the detention was manifestly illegal—the law having been wrongfully construed by the special tribunal. Here the certified questions relate to decisions upon questions of fact.

The Government does not maintain that the courts have no power to supervise, by writs of *habeas corpus*, proceedings before immigration officers and, in proper cases, to afford relief. But it submits with confidence that when one seeks admission he must present the real case upon which he relies to those officers and that findings of fact by them in matters which the statutes require them to pass on should be accepted as conclusive until and unless properly impeached by

allegations and evidence, e. g., of mistake, fraud, injustice, or manifest wrong.

It would appear little short of farcical to require officers day by day to hear and decide claims of citizenship and after their judgment is pronounced to permit the applicant to go at once before the court upon a bare allegation of the same claim and secure there an entirely new trial on a different record as to all points in issue, wholly without regard to former proceedings.

This court in many opinions has passed upon the proposition here advanced as to matters before the Land Department and various officers of the Government, some of which are hereinafter cited.

In *United States* v. *Arredondo* (6 Pet., 691, 729) Mr. Justice Baldwin, for the court, said:

> It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or

special, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.

Quinby v. *Conlan* (104 U. S., 420, 425, 426). Opinion by Mr. Justice Field.

The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. * * * By them a land department has been created to supervise all the various steps required for the acquisition of the title of the Government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when preemption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. * * * For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts can not exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties.

It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department on mere questions of fact presented for their determination. It is only when those officers have miscontrued the law applicable to

the case, as established before the Department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action.

United States v. *California, &c., Land Company* (148 U. S., 31, 43).

It is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive.

The Japanese Immigrant Case (189 U. S., 86, 100).

It has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was "due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency."

Bates & Guild Company v. *Payne* (194 U. S., 106, 109). Opinion by Mr. Justice Brown.

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a

> Department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Foley v. *Harrison et al.*, 15 How., 447.

Murray's Lessee et al. v. *Hoboken Land and Improvement Co.*, 18 How., 272.

Rubber Co. v. *Goodyear*, 9 Wall., 798.

Shepley et al. v. *Cowan et al.*, 91 U. S., 340.

Moore v. *Robbins*, 96 U. S., 535.

Springer v. *United States*, 102 U. S., 586.

Steel v. *Smelting Co.*, 106 U. S., 450.

Hilton and another v. *Merritt, Collector*, 110 U. S., 97, 106.

Hadden v. *Merritt*, 115 U. S., 25, 27.

Lee v. *Johnson*, 116 U. S., 51.

Heath v. *Wallace*, 138 U. S., 585.

Burfenning v. *Chicago, St. Paul, etc., Railway*, 163 U. S., 323.

Bushnell v. *Leland*, 164 U. S., 684, 685.

Gardner v. *Bonestell*, 180 U. S., 369.

Bates & Guild Co. v. *Payne*, 194 U. S., 106.

Where the jurisdiction of a tribunal of special or limited authority may be said to depend upon the existence of a certain state of facts which it must pass upon, its decision thereon, if there was any evidence on

[Continuation of page 25.]

Freeman on Judgments, 4th ed., sec. 523:

> Whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive and not subject to any collateral attack. (See authorities cited.)

Cooley's Const. Lim., 7th ed., p. 586 and authorities.

Brittain v. *Kinnaird*, 1 Broderick & Bingham, 432.

Wanzer et al. v. *Howland et al.*, 10 Wis., 8, 16:

> If a tribunal is authorized to act upon a certain state of facts, and also to try whether the facts exist, then, if they are properly alleged before it, and the parties are legally notified and have opportunity to contest them, the finding of such a tribunal upon those facts would be the finding of a competent tribunal, and ought to be conclusive until reversed in a direct proceeding.

Comstock v. *Crawford*, 3 Wall., 402.

Thompson v. *Whitman*, 18 Wall., 457, 468.

Van Fleet on Coll. Attack, sec. 63.

which to base it, must be held final and conclusive in all collateral inquiries.

Cooley's Const. Limitations, 6th ed., p. 501 and authorities there cited.

Am. & Eng. Enc. of Law, 2d ed. (title, Jurisdiction), vol. 17, p. 1085, and authorities there cited.

Church on Habeas Corpus, 2d ed., pp. 381, 517.

The People ex rel. Tweed v. *Liscomb* (60 N. Y., 559, 568).

The distinction between courts of limited and of general jurisdiction is this, that when their acts and judgments are relied upon, either as giving a right or furnishing a defense, jurisdiction of the latter is presumed, while that of the former must be proved; but the presumption in favor of the jurisdiction of the court of general jurisdiction is one of fact, and not conclusive. It may be rebutted. If it depends upon the existence of certain facts, and the court has passed upon those facts, the determination is conclusive until its judgment has been reversed or set aside, and this rule is as applicable to the judgments of inferior as of superior courts.

People's Savings Bank v. *Wilcox*, 15 R. I., 258, 260.
Evansville, &c., R. R. Co. v. *Evansville*, 15 Ind., 395.
Brittain v. *Kinnaird*, 1 B. & B., 432.
Simmons v. *Saul*, 138 U. S., 439, 452.
New Orleans v. *Fisher*, 180 U. S., 185.

A *habeas corpus* proceeding is collateral to one the validity of which is attacked thereby.

In re Lennon, 166 U. S., 548, 553.
Ex parte Watkins, 3 Peters, 193.

III.

The function of habeas corpus is to test the legality of confinement, and unless that appears contrary to law the writ should not be granted. Immigration officers are required to exclude every Chinaman who fails to show before them a right of entry. The detention necessary to secure return of an excluded one can not be illegal unless the exclusion resulted from fraud or mistake or from some illegal or unwarranted action by the officers in the proceedings before them.

The purpose of the Chinese exclusion acts is to *prevent* landing of Chinese persons unless it affirmatively appears they are exempt from the general provisions because officials, teachers, students, merchants, travelers, or citizens of the United States. Inspection officers must enforce the laws and exclude every Chinaman not shown to be entitled to enter. If they should permit entry without demanding satisfactory proof of facts they would grossly violate their duty. An examination of the laws will make this manifest; and as to all Chinese except such as claim birth in the United States, I do not understand this theory of the law is denied.

In the *Sing Tuck* case this court declared the right and duty of inspection officers to pass upon claims of Chinese seeking admission on the border, and that such persons may be legally detained until before those offi-

cers they establish citizenship in some reasonable way. The applicant's *case* must be submitted to the officers.

The possible question, therefore, which can be presented to the court upon *habeas corpus* is whether citizenship has been established in some reasonable way, or an effort in good faith has been made so to do, before inspection officers in the necessary preliminary investigation. And unless it is alleged and shown that upon such investigation the officers should have admitted the applicant his exclusion and detention awaiting a return to the country from whence he came can not be said to be illegal.

It is the manifest duty of the officers to exclude and detain any Chinaman who fails to establish before *them* a right to enter, and detention in pursuance of such duty is lawful. If there was fraud or some illegal or unwarranted action in the course of the proceedings, the detention may be illegal; but if not, the imprisonment is proper.

Any proceedings before the court upon *habeas corpus* should be based on the case made before executive officers, and unless their judgment founded on that can be impeached in some proper way it should be treated as final. To allow an entirely new trial upon a wholly new record whenever citizenship is alleged would, in case of rejection, render the original investigation valueless—make it, indeed, an idle waste of time and energy. This would, moreover, nullify the requirement that the applicant must in some reasonable way demonstrate to the inspection officer right of entry and require that

officer in many, if not all, cases to act upon one state of facts—perhaps a mere perfunctory showing—and then leave the court to pass upon an entirely different one. The applicant must submit, or in good faith attempt to present, the facts upon which he claims the right to enter when he first seeks the privilege; otherwise his *case* can not in any proper sense be ruled on at all.

The officer in charge must either grant or reject an application upon the showing made to him when citizenship is set up and when not. If, as the law requires, he excludes the applicant and orders his return, the resulting confinement is clearly not unlawful—it is in exact harmony with the law. If to exclude one who claims citizenship is therefore illegal, it results that all who make such pretensions must be allowed to enter without question. This would destroy the power of the Government to protect itself.

Ex parte Watkins (3 Peters, 201).

The purpose of a writ of *habeas corpus* is to inquire into the *legality* of the confinement, and unless the court finds such confinement contrary to law the writ should be dismissed.

Nishimura Ekiu v. *United States* (142 U. S., 651, 662).

> A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody.

Ex parte Curtis, 106 U. S., 375.
Wales v. *Whitney*, 114 U. S., 571.
Carter v. *McClaughry*, 183 U. S., 381.

Unless the return to a writ of *habeas corpus* is in some way traversed the facts therein stated must be taken as true.

Crawley v. *Christensen*, 137 U. S., 94.

The writ of *habeas corpus* can not properly be used to perform the function of a writ of error or appeal.

Ex parte Watkins, 3 Peters, 201.
Wales v. *Whitney*, 114 U. S., 571.

IV.

The questions—their importance, their scope, and suggested answers thereto.

When the *Sing Tuck* case was before the court the Government pointed out the gravity of the issues involved, and undertook to show existing abuses and how the courts would probably be swamped with fraudulent litigation if the contention advanced in behalf of the Chinese should be sustained. Since the decision in that case the former practice has been modified by prosecuting formal appeals to the Secretary of Commerce and Labor, and when they have been dismissed writs of *habeas corpus* have been obtained in the same old way upon mere allegations of citizenship. The District Court at San Francisco has granted the writs as a matter of course. The result is that many proceedings of this character have been instituted in that jurisdiction and many more are in prospect.

The difficulties above narrated in reference to Chinese cases are likewise incident to the execution of the general immigration laws. The points upon which the Government now seeks an authoritative ruling are of great moment in view of the vast numbers seeking admission into the United States and the countless fraudulent claims to citizenship therein.

The first question:

In the opinion in the *Sing Tuck* case this question seems to have been fully answered in the negative. But the inferior court has either not so construed that opinion or has not felt bound to follow it. This question has been propounded in order that the practice may be settled.

The second question:

The Government submits this question should be answered by saying that the writ should be dismissed and no new or further hearing granted upon evidence to be presented. It appears unreasonable that hearing and judgment by immigration officers should be required and no effect whatsoever given to them by the courts.

The third question:

It is respectfully submitted this question should be answered by saying that under the conditions specified the court should treat the finding and action of the executive officers upon the question of citizenship and other questions of fact as having been made by a

tribunal authorized to decide the same and as final and conclusive, unless it should affirmatively appear that they are subject to impeachment for fraud or prejudicial error in the proceedings.

J. C. McREYNOLDS,

Assistant Attorney-General.

MARCH, 1905.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
vs.
JU TOY, APPELLEE.
} No. 535.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEE AND ON BEHALF OF THE CHINESE SIX COMPANIES.

It appears from the "Certificate," which is the only record before this Court, that the District Court of the United States for the Northern District of California issued the writ of *habeas corpus* on behalf of Ju Toy, named as appellee herein, upon allegations made on his behalf that he is a native and a citizen of the United States unlawfully restrained by an officer of the Steamship Company upon whose vessel said Ju Toy had entered the Port of San Francisco; that he was so detained upon the pretense that he was an alien Chinese not entitled to enter the United States under the Chinese Restriction Acts. It also appears from the certificate that the United States, by the United States Attorney for said Dis-

trict, intervened in the *habeas corpus* proceeding and became the actual respondent; that a return or answer was filed, that a judicial trial was had and that said court found as a fact, upon evidence taken contradictorily with the United States, that said Ju Toy was born in the United States; found as a conclusion of law that he is a citizen of the United States and ordered that he be discharged from detention.

The legal presumption is that this judgment was based upon sufficient legal evidence and that the judgment is valid, assuming that the court had jurisdiction to issue the writ and was not concluded from trying the matter by the previous adverse decision of the immigration officials, as contended by the government.

An appeal was taken by the United States from the decision of the District Court to the Circuit Court of Appeals for the Ninth Circuit and the judges of that court have certified certain questions under the provisions of the act of March 3rd, 1891, and ask instructions of this court. These questions, far-reaching in their scope, are of vital interest to the appellee named in these proceedings, who has been adjudged by one of the courts of the United States to be a native and a citizen; of vital interest to all natives of Chinese descent.

Such persons are citizens of the United States and entitled to all the rights of citizenship. The Chinese Exclusion and Restriction Acts do not apply to

them. *United States vs. Wong Kim Ark,* 169 U. S. 653.

As citizens, they have the right to travel abroad and to return to the United States. If the contention of the government in this behalf is sustained, they must do so at the peril of being excluded and deported by immigration officers appointed to deal with objectionable aliens, and they must be denied the right of appeal to the courts for a judicial determination of the claim of citizenship.

Citizenship is a right of incalculable value. It is a right of which a man cannot be deprived, constitutionally, except by due process of law. In this connection it is the exact equivalent of the right of liberty. Due process of law, in this regard, is judicial process—the right and opportunity to be heard in a judicial tribune of competent jurisdiction. If it be argued in this matter as it was argued by the Attorney General in the case of *Sing Tuck,* 194 U. S. 161, that Congress may establish special tribunals to hear and determine matters and questions of fact arising in the course of their duties and that the decisions of such special tribunals are final and conclusive, we answer, without admitting that such decisions are ever final or withdrawn from ultimate judicial review where questions of private rights arise—aside from this, we answer that Congress has not established any special tribunal with power to pass upon the claim of any person to the right of citizenship.

No Act of Congress can be construed or understood to be a bar to a judicial hearing and determination of the question of citizenship. *Gee Fook Sing vs. United States*, 49 Fed. Rep. 146.

Indeed, the act of August 18th, 1894, under which it is asserted by the government in this proceeding that the immigration officials may finally pass upon the claim of a native Chinese to the right of citizenship, applies in terms to aliens only. The department rules in this behalf, known as the Chinese Regulations, citing as authority the case of *Wong Kim Ark, supra*, declare that they do not apply to Chinese persons born in the United States:

> "If the Chinese person has been born in the United States, neither the Immigration Acts nor the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, apply to such persons." Rule 2.

This Court held in the case of *Sing Tuck, supra,* that the immigration officials must determine in the first instance the claim of nativity when preferred by an arriving Chinese and that a writ of *habeas corpus* should not issue until such claim has been passed upon in an orderly manner by the Department of Commerce and Labor.

The government is now seeking to obtain a decision from this court that the determination by the

department as to the claim of nativity is and must be final. But why? Congress has not said that such decision shall be final. The act relied upon applies to aliens only, as already said. There is no rule of law under which it can be contended that such a decision is final. In those instances where it has been decided that special tribunals may be established by Congress to determine questions of fact arising in administrative matters, it has always been held that while the courts will not interfere with such special tribunals by mandamus, if questions of private rights afterwards arise in respect to facts determined by such special tribunals, resort may be had to equity for the ultimate determination of such private rights. See *Johnson vs. Towsley,* 13 Wall. 83.

Due process of law in a matter affecting the right of a man to be free—the claim of the right to be and remain in one's native land and not to be deported therefrom, certainly involves the right of personal liberty—due process of law in this regard implies the right to have that right determined in a judicial proceeding by a constitutional court of justice; implies the right to "a day in court"; to the right to have witnesses for himself and to be confronted by the witnesses against him; implies the right to have the assistance of counsel of his own selection. The proceeding may be never so summary, still, these fundamental rules and rights must be recognized and accorded in order to constitute due process of law in

matters affecting the personal liberty of one claiming to be a citizen of the Republic.

In the *Sing Tuck* case, *supra,* it was suggested that the rules of the Department of Commerce and Labor known as the Chinese Regulations, do not afford a citizen due process of law, and, replying to this suggestion, the court gave a passing glance at such of these rules and regulations as seemed to apply, and commended them as reasonable and fair; without, however, saying that they meet the constitutional requirements as to due process of law. It should be noted, however, that the court had in view the peculiar facts of the case of *Sing Tuck* "and thirty-two others."

We submit that the rules for the summary investigation of the claims of arriving Chinese persons to enter or re-enter the United States do not afford due process of law with respect to the rights of persons who claim to be citizens.

Congress may provide, in the exercise of its exclusive control of the political power, for the summary exclusion of aliens and in this regard aliens have no constitutional or legal rights which entitle them to resort to the courts. Hence, this court has uniformly sustained the act of August 14th, 1894. Congress, however, we repeat, has not attempted to deny, and we assert, could not constitutionally deny, the right of the writ of *habeas corpus* to any class of citizens of the United States.

Citizens of Chinese descent constitute a class of persons—a class of citizens. Can it be contended that Congress has the constitutional power to suspend the writ of *habeas corpus* or to deny the right of the writ to any class of citizens?

Will this court, at the instance of the Department of Justice, construe such a conclusion into the act of Congress and into the Chinese Regulations of the Department of Commerce and Labor?

Habeas corpus is the proper and the only remedy in these cases. *In re Jew Wong Loy,* 91 Fed. Rep. 240. *In re Jung Ah Lung,* 25 Fed. Rep. 141, affirmed 124 U. S. 621.

In this matter the Judges of the Circuit Court of Appeals have certified three questions upon which they desire the instructions of the Supreme Court. We submit that if the court answers the first question in the affirmative and decides that a District Court of the United States should grant a writ of *habeas carpus* to a person of Chinese descent claiming to be a citizen, although his claim of citizenship has been decided adversely to him by the immigration officers and by the Department of Commerce and Labor on appeal, then the other questions become immaterial. In other words, if it be held that a person claiming to be a citizen has a right to the writ of *habeas corpus* for the purpose of having his claim of citizenship determined by the court, it is wholly immaterial

whether or not the immigration officers gave him a proper hearing or abused the discretion vested in them, since their decision cannot be final in any event. In this view, it was not necessary to allege in the petition for the writ that the detained person was denied a proper hearing or that the officers had abused their discretion—these allegations were not necessary since they were not required to be proved.

We submit, however, that if the court, in instructing the Circuit Court of Appeals in answer to the second and third questions, should hold that either of such allegations was necessary, then the court should direct that the appellee be allowed to have his petition for the writ amended accordingly. A person entitled to the writ of *habeas corpus* should not be allowed to suffer through the inadvertence or mistake of the person who has sued out the writ in his behalf. *State vs. Benjamin Scott,* 1 Bailey (S. C.) 294.

This case is not direct authority, but the language of the court affords a most pertinent illustration upon the point just suggested as well as upon other significant phases of this cause. It was a case which arose under an old statute of South Carolina which created a special tribunal composed of Justices of the Peace and freeholders for the trial of slaves and free negroes. The defendant was arrested, brought before one of these special tribunals and charged with being a free person of color and with stealing a negro.

He pleaded that he was white and that the court was without jurisdiction to try him. His plea was disallowed. After many complications the matter came to the Court of Appeals on an application for prohibition. In deciding the matter Judge Johnson of that court said:

> "The question whether the person is entitled to be tried by a jury according to the forms of the common law, or in the summary and in some degree arbitrary manner authorized by the act under which he was arrested, is of itself of little less importance than life and death. It is whether he shall occupy the rank of a free white citizen or one corresponding in this respect with that of a slave; and I cannot consent, where the court possesses any discretion, that a question so important shall be compromitted by the want of a precedent, or inadvertence or surprise, and I am, therefore, of the opinion that the prisoner should yet be afforded an opportunity of testing this question by the rules before laid down."

The undersigned, as the certificate shows, were not the attorneys of Ju Toy, the appellee, in the District Court. They are now, however, attorneys of record in the Circuit Court of Appeals and they appear here in this behalf at the instance of the Chinese Six Companies, who represent a large majority of the resident Chinese in the United States and among them

a great many who have been born in the United States during the past half century.

It is now earnestly submitted on their behalf that the court, in deciding this matter, should consider its bearing upon the rights of the whole class of citizens to which the appellee belongs.

The learned Solicitor General, in his printed motion to advance this cause on the docket, permitted himself to say, outside of the record, of course, that the courts in California are flooded with similar cases, and permitted himself to criticize the court in which similar writs of *habeas corpus* have been sued out since the decision of the case of *Sing Tuck*.

These suggestions of the Solicitor General dehors the record, warrant us in saying here that the whole bar and all the Federal Judges in California hold the learned and upright Judge of the District Court and the Special Referee and Examiner mentioned in the certificate as above criticism in respect to such cases.

It is true, as said by the Solicitor General, that there have been many such cases in the courts at San Francisco since the decision in the case of *Sing Tuck* though the use of the word "flooded" is an extravagance. But it is not correct as intimated by the learned Solicitor General, that there has been any unwarranted interference with the administration of the Chinese Restriction Acts at San Francisco or in the Department of Commerce and Labor. Of the

many writs which have been issued as said by the Solicitor General, many have been discharged and the applicants remanded for deportation; many others for whom writs have been obtained have been enlarged after the most painstaking judicial inquiry. Some mistakes have, no doubt, been made, but the records of such cases show beyond all reasonable doubt that many natives of the United States have been refused landing by the immigration officers and the department.

This is, perhaps, inevitable. The hearing under the "Chinese Regulations" is a star chamber proceeding, wholly devoid of the sanctions of a judicial examination. The person whose right to return home is at stake if he be a native, is denied the benefit of counsel and in the very nature of things, and, aside from race hatred and prejudice which too often intervenes, many mistakes are made and many cases of grievous injustice occur.

We are now contending for the right of persons so wronged to have judicial redress by due process of law in a court of justice.

Respectfully submitted.

HENRY C. DIBBLE,
Attorney for Appellee
and for Chinese Six Companies

OLIVER DIBBLE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 535.

THE UNITED STATES

vs.

JU TOY.

SUPPLEMENTAL BRIEF FOR APPELLEE.

The case is fully stated in the appellee's original brief and in the brief filed on behalf of the Government.

The issue presented is based entirely upon the construction and constitutionality of the act of Congress of August 18, 1894.

The question of the interpretation and validity of that act has been recently before this court in the case of *Sing Tuck vs. U. S.* (194 U. S., 161).

In that case the facts were identical with these with the one exception that there the writ of *habeas corpus* was sued out before the appeal to the Secretary of Commerce and Labor; here the writ is sued out after the appeal. In both cases the decision of the executive officer was against the alleged citizen; in both cases the decision of the judicial tribunal was in his favor.

In the *Sing Tuck* case the contention of the appellee was twofold: First, that the act under consideration by its terms

only applied to aliens, and not to those claiming to be citizens; second, that if it could be construed to apply to the latter class of persons such part as applied to those claiming citizenship was unconstitutional because it would deprive a citizen of his liberty without due process of law.

The majority opinion holds that for the purpose of determining the question of the fact of citizenship in the first instance the act applies to those claiming to be citizens as well as to those admittedly aliens, and that it is not a deprivation of due process of law to compel a Chinese person claiming to be a citizen to be subjected to this "sifting process" delegated to executive officers before allowing him to test the fact of his citizenship upon *habeas corpus*. But the court in that case expressly refrains from determining the question whether or not such alleged citizen would have such right after an adverse decision of the Secretary of Commerce and Labor upon appeal.

The only question therefore presented in the present case is the one question left undisposed of in the Sing Tuck case, and it practically resolves itself into this: Is the act of 1894, making the decision of the Secretary of Commerce and Labor final upon the question of citizenship, after its determination by them on appeal adversely to the claimant, constitutional?

It is claimed by the appellee that it is not, in that if it were it would deprive him of his liberty without due process of law, as guaranteed by the fifth amendment to the Federal Constitution.

ARGUMENT.

Comment should first be made upon certain arguments outlined by the Government in its brief and urged at the hearing before the court. It is first contended that to allow proceedings upon *habeas corpus*, after a decision by the Secretary of Commerce and Labor adverse to the applicant, would

"render the original investigation valueless, make it indeed an idle waste of time and energy;" and also that it would "nullify the requirement that the applicant must in some reasonable way demonstrate to the inspection officer right of entry and require that officer in many, if not all cases, to act upon one state of facts—perhaps a mere perfunctory showing—and then to have the court to pass upon an entirely different one."

As we read the *Sing Tuck* case, its conclusions, which are entirely reasonable, would in no manner be nullified by a decision in this case favorable to the appellee. The Sing Tuck case only requires resort in the first instance to what it terms a "*sifting process*." Those who have been "sifted" through have no further controversy with the Government; whether the others can proceed further it does not say. Of twenty-five Chinamen claiming to be American citizens and seeking admission into this country, it is safe to say that if they all had their election of proving their claims before the district judge according to common-law rules of evidence and subject to the privilege of the sixth amendment defining due process of law, or before an arbitrary inspector where, under the rules, almost every privilege is denied them and where the proceeding is governed by no rules for the admission or exclusion of evidence, it is safe to say, we argue, that the whole twenty-five would resort to *habeas corpus* in the district court; but under the rulings in the Sing Tuck case their claims must be first passed upon by the inspector and then by the Secretary. Now, out of the twenty-five, fifteen would probably be admitted by the inspector, and on appeal by the remaining ten there would probably be a reversal in five cases. So the Sing Tuck decision, instead of rendering the proceedings before the inspector and before the Secretary valueless, has had the effect of decreasing the number of *habeas corpus* cases in the district court from twenty-five to five—a consummation of immense value in the orderly administration of justice.

It is, too, claimed that the case passed upon by the inspector might, and in many cases *is*, an entirely different one from that subsequently to be passed upon by the district judge. In answer to this, it is earnestly urged that if it were not, the applicant would have no cause of complaint. If the proceedings before the inspector could be made identical with those before the district judge the applicant would get his due process of law in the first instance, and he would be content to be concluded by the inspector's findings properly reviewed. But it is the very foundation of the applicant's complaint that he *cannot*, under the rules laid down by the Immigration Bureau governing the proceedings before the inspector, present the case that he subsequently presented in the district court, when he is granted the privileges embodied in the sixth amendment to the Federal Constitution, or, in other words, when he is not deprived of due process of law. There is nothing more salutary than the rule that where an issue of fact has been determined by a proper tribunal it cannot be re-examined collaterally; but the rule has its foundation in the fact that the first trial was in a proper tribunal.

In the argument at bar the Attorney General in elaborating upon this point instanced the following case: A trial for murder. The fact in issue is the commission of the murder. There is a verdict of conviction. Can the facts upon which that conviction is based be re-examined and passed upon in *habeas corpus* proceedings? The answer, we confidently submit is not that they could not merely because there had been a former trial, but because there had been a former *constitutional trial*, such as is guaranteed by the fifth amendment to the Constitution. But if the detective delegated to apprehend the murderer should, after consideration of the evidence before him, pronounce the prisoner guilty his findings would not be taken as conclusive. There is a United States statute that excludes convicted felons from admission into the country. Could Congress delegate to an inspector

authority to pass finally upon such evidence as he might gather as to whether or not an applicant is a convicted felon? Congress could also probably exclude criminals, but it would not make the conclusion of a non-judicial inspector final on the question of guilt or innocence.

It has been argued, too, that the fact upon which a court bases its jurisdiction having been tried by the court and found in favor of the *jurisdiction* cannot be attacked collaterally; but there again the fact in issue has been given a judicial determination.

But it is argued the case before the inspector might be entirely different from that presented to the court. It would be a curious thing indeed if the trial in the district court where the accused is given compulsory process to compel the attendance of witnesses, where he is allowed counsel who can develop on cross-examination facts that otherwise would never be known, and where the admission and exclusion of evidence are regulated by the common-law rules of evidence—it would be curious, we say, if the case so presented resembled in any degree the case made out before the inspector, where there is no compulsory process, where no counsel is allowed the accused to cross-examine the witnesses against him, and where testimony is received and excluded by a subordinate executive officer of the Government who is probably not acquainted with so much as the title to the most elementary work on the law of evidence. On appeal to the Secretary, an executive officer again passes upon the same evidence thus produced before the inspector. We will impute the honestest motives to all the inspectors, but who can but condemn a system that will permit an American citizen to deportation upon hearsay testimony that he is an alien.

Another argument at bar on behalf of the Government was that *habeas corpus* should not be resorted to unless there be an allegation of some abuse of discretion by the inspector or some unwarranted action in receiving and excluding evidence. Is not the fact that it is discretion entirely and

not the common-law rules of evidence that governs his admission and exclusion of testimony sufficient to entitle the applicant to a proper and constitutional trial in the district court? The Attorney General distinguishes *Gonzales vs. Williams*, 192 U. S., 1, from cases similar to the present, by saying that in that case the facts were conceded and an issue of law only was presented which could not be passed upon by the executive officer, and for that reason the courts assumed jurisdiction. If the executive officers in that case could not pass upon the law involved, how in these cases can they pass upon the law respecting the admission or rejection of evidence which must be settled by them before testimony can be received to establish the issue of facts? The one case would leave as much law to be passed upon by a layman as the other.

It is believed that no better illustration of the pernicious consequences of leaving to the final determination of the executive officer the question of citizenship can be had than is presented in the present case. The appellee, Ju Toy, is admittedly an American citizen. He has established his status before a properly constituted judicial tribunal. The Government is appealing, not because it contends that Ju Toy has not properly proved that he is an American citizen, but because it complains that he should not have been given the privilege of proving it by recognized methods of proof. Its contention in brief is that this man, legally and lawfully adjudged to be an American citizen by the law of the land—the law by which even a pickpocket is entitled to be tried (*Callan vs. Wilson*, 127 U. S., 540)—should be retaken into custody, deprived of his liberty, and exiled for life from his native land, from his friends, from his business and property, merely because some subordinate immigration inspector, who has achieved his position as the result of some catch-question examination, with no knowledge of the fundamental principles of law or evidence, acting upon the necessarily limited evidence before him, entertains a doubt which the

Government is made entitled to, upon the fact of citizenship. Can there be any doubt but that a great proportion of the itinerant population of the country, admittedly Anglo-Saxon citizens, if called upon to prove the fact of their citizenship under such conditions would fail?

THE AUTHORITIES.

1. The question whether or not the hearing before the inspector amounts to due process of law as to those claiming citizenship has, of course, not been disposed of by this court. It was merely postponed in the *Sing Tuck* case.

Whenever the question has been raised, however, in the lower Federal courts the decisions have all held that such proceeding does not amount to due process of law (*Gee Fook Sing vs. U. S.*, 49 Fed. Rep., 146). Before the ruling of this court in the Sing Tuck case the lower courts had all held that the writ could issue before the hearing before the inspector and the appeal therefrom. Since that decision all the courts have held that the writ will lie after the appeal, and that to deny it would be a denial of the due process of law guaranteed by the fifth amendment. Every adjudicated case upon the point, therefore, holds with the appellee.

2. With reference to the cases cited by the Attorney General on his brief:

In *Lem Moon Sing vs. U. S.*, 158 U. S., 538, the applicant was concededly an alien, and this court there only held that with respect to an alien the decision of the Secretary of Commerce and Labor on appeal is conclusive.

In *Chin Bak Kan vs. U. S.*, 186 U. S., 193, the proceeding to deport was under the act of 1888, which concludes:

"But any such Chinese person convicted before a commissioner of the United States court, may within ten days from such conviction appeal to the judge of the district court for the district."

Here it will be seen the trial provided by the Constitution is expressly given him by the statute, and so this court says in its opinion in that case (page 200):

"A United States commissioner is a quasi-judicial officer and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court and his decision was affirmed so there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute."

In the *Japanese Immigrant* case, 189 U. S., 86, the applicant was admittedly an alien, and the reason for the ruling in that case can certainly not be considered to apply to one who claims to be a citizen.

In *Murray's Lessee vs. Hoboken Land Company*, 18 Howard, 272, the question involved was one of due process of law with respect to deprivation of property. The owner of the property was a United States collector of customs, who was short in his accounts. A distress warrant was issued and levied upon the land, which was sold thereunder June 10. The preceding April the same property had been sold under an execution at the instance of a private creditor. In discussing the proceeding under the distress warrant the court says:

"But is it due process of law? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see

whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on them after the settlement of this country."

It then proceeds to point out that there had always been a proceeding in England analogous to a distress warrant by which the property of a government official short in his accounts with the Crown could be summarily confiscated, and therefore concludes that a similar process authorized by statute in this country is the due process of law contemplated by the Federal Constitution.

This court has also held that proceedings to enforce the collection of taxes by summary process against the land taxed are not determinable by the same rules with respect to due process of law as cases involving deprivation of life or liberty. In Hagar *vs.* Reclamation District, 11 U. S., 701, it is said:

"The appellant contends that this fundamental principle was violated in the assessment of his property, insomuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing, his contention being that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property.

"*Undoubtedly* when life and liberty are involved 'due process' requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard.

"So also when title or possession of property is involved. But when the taking of property is in the enforcement of a tax the proceeding is necessarily less formal."

COLLATERAL ATTACK.

It is submitted that when the right to due process of law depends upon the existence of a fact the party claiming the right is entitled to have that fact tried according to the law of the land. Were this not so it can be readily seen that in permitting the fact to be tried by arbitrary rules this constitutional guarantee can be greatly abridged, if not entirely destroyed.

In *Ex parte* Milligan, 4 Wall., 1, the facts were these: Milligan was tried before a military commission on charge of being in open rebellion against the United States Government. He was convicted and sentenced. He then applied to the court for a writ of *habeas corpus*, alleging that the military court had no authority to try him.

The court, in the *habeas corpus* proceeding, inquired into the question of fact upon which depended the right of the petitioner to be tried by a civil or a military court, and, finding that he was entitled to be tried by a civil court, discharged him. In speaking of the trial before the military commission the court says (p. 201):

"Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? And if so, what are they?

"Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'"

To the same effect is the case of State *vs.* Scott, 1 Bailey (S. C.), 294, cited at page 8 of the Appellee's Original Brief.

The doctrine of collateral attack and retrial of issues of fact imply a trial by some judicial tribunal in the first instance. It can certainly not apply to the mere opinion of an immigration inspector, whose function is nothing more than that of a detective appointed to apprehend a suspect.

Respectfully submitted.

HENRY C. DIBBLE,
Attorney for Appellee and for
Chinese Six Companies.

OLIVER DIBBLE,
HAYDEN JOHNSON,
Of Counsel.

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In the Supreme Court of the United States.

UNITED STATES *vs.* JU TOY. } OCTOBER TERM, 1904. No. 535.

Now comes the petitioner, Ju Toy, by his attorneys, and prays the Court to stay its mandate in the above-entitled cause and grant him a re-argument thereof, for the reasons hereinafter urged.

HENRY C. DIBBLE,
OLIVER DIBBLE,
HAYDEN JOHNSON,
Attorneys for Ju Toy.

ARGUMENT.

The Court is not insensible to the far-reaching effect of its decision in this case and its influence upon the subsisting relations between this country and the Chinese Empire. This consideration is, of course, only suggested as an indication of the vital nature of the principle involved and the consequent necessity for its careful and correct determination.

The [redacted] ruling of the Court, if correct and sustained, obviously will have the effect of excluding a few more Chinese from entrance into this country, but will, on the other hand, seriously embarrass our commercial relations with China.

It is believed and very respectfully submitted that the conclusion reached by the majority of the Court is unsustained

by precedent and that owing no doubt to imperfect presentation of the case by counsel for Ju Toy, controlling considerations have been overlooked.

It is earnestly urged that the cases cited by the Court in its opinion as tending to support its conclusion, namely, the Japanese emigrant case, 189 U. S., 86; Chin Bak Kan *vs.* United States, 186 U. S., 193; Fok Young Yo *vs.* United States, 185 U. S., 296; and Lem Moon Sing *vs.* United States, 158 U. S., 538, specifically and distinctly have reference to Chinese persons who are admittedly aliens, and that such being the case, obviously their reasoning when applied to one admittedly an American citizen entirely fails.

In Fok Young Yo *vs.* United States, 185 U. S., 296, Chief Justice Fuller states the case as follows:

> But the facts agreed are simply that the petitioner was a *subject of the Empire of China*, arriving at the port of San Francisco, whose intended destination, as appeared by the manifest of the vessel in which he arrived and by his own allegation, was San Jose de Guatemala in the Republic of Mexico * * * and that the collector of customs at San Francisco denied him the privilege of further pursuing his journey to his alleged point of destination, and issued an order directing him to be detained and deported to China. The whole question in the case, therefore, is whether this denial and order of the collector were authorized by law.

Chin Bak Kan *vs.* United States, 186 U. S., 193, was affirmed solely because a constitutional trial was provided by statute, the Court saying:

> A United States Commissioner is a quasi judicial officer and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court and his decision was affirmed, so there was an adjudication by a United

> States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute.

But the Court in the present case concedes in its opinion that these cases are not conclusive of the point under discussion. But as they are all based more or less directly upon the fact that the claimant is an alien, it is difficult to see why they do not rather form an argument against the position of the Court than in its favor.

The Court further in its opinion says that the question involved in this case is no longer a new one, but counsel for appellee respectfully submit that the question was expressly left open and undecided in the case next cited.

In United States *vs.* Sing Tuck, 194 U. S., 160, in speaking of the act of 1894, this Court says:

> Whatever may be the law on that point, the decisions just cited are enough to show that it is too late to contend that the act of 1894 is void as a whole. But if the act is valid, *even if ineffectual on this single point*, then it points out a method of procedure which must be followed before there can be a resort to the courts.

It seems impossible to construe this language otherwise than as holding that the act can be valid as to Chinese not claiming to be American citizens and ineffectual as to those making such a claim. It is entirely upon the theory that such a construction can be given to the act that the cases referred to in the Sing Tuck case were decided. If such a construction could not be given to the act, those cases, it is submitted, would have met with a different fate, or the foundation for their decisions would have been unsupported.

The Court now says in its opinion in this case in reference to that act:

> It also is established by the former case (the Sing Tuck case) and others which it cites that the relevant portion of the act of August 18, 1894, c. 301, is not void as a whole. The statute has been upheld and enforced, but the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. * * * It necessarily follows that when such words are sustained that they are sustained to their full extent.

The conclusion in this case, then, is that the decision in the Sing Tuck case is sustained upon the theory that the act may be ineffectual as to certain persons though valid as to others, thus leaving undecided the constitutional question presented, while the decision in this case is founded upon the theory that the Sing Tuck case having decided that a portion of the act is valid, it is valid in its entirety and therefore the point presented directly in this case is no longer a new one for determination.

Respectfully submitted,

HARRY C. DIBBLE,
OLIVER DIBBLE,
HAYDEN JOHNSON,
Attorneys for Ju Toy.

Supreme Court of the United States.

No. 535.—October Term, 1904.

The United States vs. Ju Toy. } On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 8, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the Steamship Doric for return to China, presented a petition for *habeas corpus* to the District Court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued and the United States made return, and answered showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth of all the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive and that no abuse of authority was shown. These were denied, and the District Court decided seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the Circuit Court of Appeals alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

"First. Should a district court of the United States grant a writ of habeas corpus in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who having recently arrived at a port of the United States made application to land as a native-born citizen thereof and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion

acts, because born in and a citizen of the United States and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

"Second. In a habeas corpus proceeding should a district court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a habeas corpus proceeding in a district court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein upon the ground that he was a native-born citizen thereof but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

We assume in what we have to say, as the questions assume, ~~that~~ no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of *United States* v. *Sing Tuck*, 194 U. S. 161, 170. "A petition for *habeas corpus* ought not to be entertained, unless the Court is satisfied that the petitioner can make out at least a *prima facie* case." This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence or allege its effect. But as it was entertained and the

District Court found for the petitioner it would be a severe measure to order the petition to be dismissed on that ground now, and we pass on to further considerations.

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in *United States* v. *Sing Tuck*, 194 U. S. 161, 167, that the Act of August 18, 1894, c. 301, § 1, 28 Stat. 372, 390, purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in *The Japanese Immigrant Case*, (*Yamataya* v. *Fisher*,) 189 U. S. 86, 97, it was said: "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this Court." See also *Turner* v. *Williams*, 194 U. S. 279, 290, 291; *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200. In *Fok Young Yo* v. *United States*, 185 U. S. 296, 304, 305, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in *Lem Moon Sing* v. *United States*, 158 U. S. 538, where the petitioner for *habeas corpus* alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases and the language which we have quoted is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicil and the belonging to a class excepted from the exclusion acts. *United States* v. *Sing Tuck*, 194 U. S. 161, 167. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 546, 547. It also is established by the former case and others which it cites that the relevant portion of the Act of August

18, 1894, c. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States* v. *Reese*, 92 U. S. 214, 221. *Trade Mark Cases*, 100 U. S. 82, 98, 99. *Allen* v. *Louisiana*, 103 U. S. 80, 84. *United States* v. *Harris*, 106 U. S. 629, 641, 642. *Virginia Coupon Cases*, 114 U. S. 269, 305. *Baldwin* v. *Franks*, 120 U. S. 678, 685–689. *Smiley* v. *Kansas*, 196 U. S. 447, 455. It necessarily follows that when such words are sustained they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. *In re Ross*, 140 U. S. 453, 464. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Ekiu* v. *United States*, 142 U. S. 651, 660, and in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, before the authorities to which we already have referred. It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole Court in *Murray* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 546, 547. *Japanese Immigrant Case*, 189 U. S. 86, 100. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508, 509.

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case.

It will be so certified.

Supreme Court of the United States.

No. 535.—October Term, 1904.

The United States *vs.* Ju Toy. } On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 8, 1905.]

Mr. Justice Brewer, dissenting.

I am unable to concur in the views expressed in the foregoing opinion, and, believing the matter of most profound importance, I give my reasons therefor.

Ju Toy presented his petition to the United States District Court at San Francisco, alleging that he was a native-born citizen of the United States; that he was a resident of the United States, temporarily absent and returning to the city and State in which he was born; that the collector of the port of San Francisco refused to permit him to land, and that he was detained by the general manager of the steamship company in which he came to San Francisco with a view to his return to China. A writ of *habeas corpus* was issued, and thereupon the District Attorney, in behalf of the United States, answered, setting up the application for landing, a hearing and denial thereof by the immigration officer, an appeal to the Secretary of Commerce and Labor, and his action approving that of the immigration officer, and with the answer exhibited a copy of all the evidence offered upon the hearing and the orders by the officer and the Secretary. Thereupon a motion was made by the District Attorney to dismiss the writ, on the ground substantially that it did not appear that the immigration officer or the Secretary of Commerce and Labor abused the discretion vested in them by law or that their action was unlawful or that any error prejudicial to the petitioner was committed. This motion to dismiss was overruled and the cause referred to a referee to take evidence. Upon the testimony taken by him the referee reported that the petitioner was born in the United States and a citizen thereof. Exceptions to this report were filed by the District Attorney, which were overruled by the court, and thereupon judgment was entered that the petitioner was illegally restrained of his liberty and that he be discharged from custody. An appeal from this order was taken to the Court of Appeals for the Ninth Circuit, which court certified to us the following questions:

"First. Should a District Court of the United States grant a writ of *habeas corpus* in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who

having recently arrived at a port of the United States made application to land as a native-born citizen thereof, and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States, and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

"Second. In a *habeas corpus* proceeding should a District Court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a *habeas corpus* proceeding in a District Court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein upon the ground that he was a native-born citizen thereof, but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

The proposition presented by these questions is that unless the petitioner for a writ of *habeas corpus* shows that the immigration officers have been guilty of unlawful action or abuse of their discretion or powers, the writ must be denied and the petitioner banished from the country. In order to see what action is lawful I refer to the rules prescribed under the authority hereinafter referred to. Rule 6 declares that "immediately upon the arrival of Chinese persons . . . it shall be the duty of the officer . . . to adopt suitable means to prevent communication with them by any persons other than the officials under his control, to have said

Chinese persons examined promptly, as by law provided, touching their right to admission and to permit those proving such right to land." Rules 7, 8, 9, 10 and 21 are as follows:

"RULE 7. The examination prescribed in Rule 6 should be separate and apart from the public, in the presence of Government officials and such witness or witnesses only as the examining officer shall designate, and, if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal and his counsel should be permitted, after duly filing notice of appeal, to examine, but not make copies of, the evidence upon which the excluding decision is based.

"RULE 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

"RULE 9. Notice of appeal provided for in Rule 8 shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary; and, within three days after the filing of such notice, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge.

"RULE 10. Additional time for the preparation of cases after the expiration of three days next succeeding the filing of notice of appeal will be allowed only in those instances in which, in the judgment of said officer in charge, a literal compliance with Rule 9 would occasion injustice to the appellant or the risk of defeat of the purposes of the law, and the reasons for delay beyond the time prescribed shall in every instance be stated in writing in the papers forwarded to the Commissioner General of Immigration."

"RULE 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to or residence within the United States to establish such right affirmatively and satisfactorily to the appropriate Government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States Government."

It will be seen that under these rules it is the duty of the immigration officer to prevent communication with the Chinese seeking to land by any one except his own officers. He is to conduct a private examination, with only the witnesses present whom he may designate. His counsel, if under the circumstances the Chinaman has been able to procure one, is permitted to look at the testimony but not to make a copy of it. He must give notice of appeal, if he wishes one, within two days, and within three

days thereafter the record is to be sent to the Secretary at Washington; and every doubtful question is to be settled in favor of the Government. No provision is made for summoning witnesses from a distance or for taking depositions, and if, for instance, the person landing at San Francisco was born and brought up in Ohio, it may well be that he would be powerless to find any testimony in San Francisco to prove his citizenship. If he does not happen to have money he must go without the testimony, and when the papers are sent to Washington (three thousand miles away from the port, which in this case was the place of landing) he may not have the means of employing counsel to present his case to the Secretary. If this be not a star chamber proceeding of the most stringent sort, what more is necessary to make it one?

I do not see how any one can read those rules and hold that they constitute due process of law for the arrest and deportation of a citizen of the United States. If they do in proceedings by the United States they will also in proceedings instituted by a State, and an obnoxious class may be put beyond the protection of the Constitution by ministerial officers of a State proceeding in strict accord with exactly similar rules.

It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the contention of the Government, sustained by the judgment of this court, is that a citizen, guilty of no crime—for it is no crime for a citizen to come back to his native land—must by the action of a ministerial officer be punished by deportation and banishment, without trial by jury and without judicial examination.

Such a decision is to my mind appalling. By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind. In *Fong Yue Ting*, 149 U. S. 698, it was held by a majority of the court that the removal from this country of an alien was not a punishment, Mr. Justice Gray, speaking for that majority, saying (p. 730):

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."

But it was not suggested, and indeed could not be, that the deportation and exile of a citizen was not punishment. The forcible removable of a citizen from his country is spoken of as banishment, exile, deportation, relegation or transportation, but by whatever name called it is always considered a punishment. In Black's Law Dictionary "banishment" is

defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life. It is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." The same author defines "exile" as banishment, and "transportation" as "a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." In Rapalje & Lawrence's Law Dictionary, (vol. 1, page 109,) "banishment" is called: "A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." In 4 Bl. Com. 377 it is said: "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation." Vattel, Book 1, Sec. 228, declares: "As a man may be deprived of any right whatsoever by way of punisnment—exile, which deprives him of the right of dwelling in a certain place, may be inflicted as a punishment; banishment is always one; for, a mark of infamy cannot be set on any one, but with a view of punishing him for a fault, either real or pretended."

President Madison, in his report on the Virginia resolutions concerning the alien and sedition laws, said, (4 Elliott's Debates, 455,) referring to the possibilities which attend a removal from the country, "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."

The twelfth section of the English Habeas Corpus, Act, (31 Car. II,) one of the three great muniments of English liberty, enacted "that no subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal, . . . and the person or persons who shall knowingly frame, contrive, write, seal, or countersign any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison, or transport any person or persons, contrary to this act, or be any ways advising, aiding, or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick-upon-Tweed, or any of the islands, territories, or dominions thereunto belonging; and shall incur and sustain the pains, penalties, and forfeitures limited, ordained and provided in and by statute of provision and *praemunire*, made in the sixteenth year of King

Richard II.; and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them."

It is true in this case the petitioner was returning to San Francisco from China. Whether his absence from this country had been for a few weeks or a few years is not shown, nor does it matter. The right of a citizen is not lost by a temporary absence from his native land, and when he returns he is entitled to all the protection which he had when he left.

In *Gonzales* v. *Williams*, 192 U. S. 1, the petitioner, held in custody by the immigration officers, sued out a *habeas corpus* on the ground that she was not an alien immigrant. The Circuit Court decided against her, but on appeal we discharged her from custody, saying (p. 7):

"If she was not an alien immigrant within the intent and meaning of the act of Congress entitled 'An act in amendment of the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor,' approved March 3, 1891, (26 Stat. 1084, c. 551,) the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed."

It is true, the facts were admitted. So placing that case alongside of this the result is that if the United States admits that the petitioner is not an alien, he is entitled to his discharge. If he proves the fact, he is not entitled, but must be deported. It was not suggested in that case that the immigration officer had been guilty of any abuse of discretion or powers, the only complaint being that he had ordered the deportation of the petitioner, who was not an alien. That same fact is alleged here, but is now adjudged insufficient to prevent the deportation. In *Gee Fook Sing* v. *United States*, 49 Fed. Rep. 146, 148, the Court of Appeals of the Ninth Circuit held:

"That any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who on that ground applies to any United States court for a writ of *habeas corpus*, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination."

See also *In re Look Tin Sing*, 21 Fed. Rep. 905; *Ex parte Chan San Hee*, 35 Fed. Rep. 354; *In re Yung Sing Hee*, 36 Fed Rep. 437; *In re Wy Shing*, 36 Fed. Rep. 553. In the first of these cases it was said by Mr. Justice Field (p. 910):

"Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of Congress."

In *Ex parte Tong Tong*, 108 U. S. 556, 559, Mr. Chief Justice Waite said:

"The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty."

In *United States* v. *Jung Ah Lung*, 124 U. S. 621, a petition for *habeas corpus* by a Chinese laborer, it was held that—

"The jurisdiction of the court was not affected by the fact that the collector had passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in case a of hardship."

By the Fifth Amendment to the Constitution no person can "be deprived of life, liberty or property without due process of law." It may be true, as decided in *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272, an action involving the validity of a distress warrant issued by the Solicitor of the Treasury, that the requirement of a judicial trial does not extend to every case, but as stated by Mr. Justice Curtis in that case (p. 284): "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." And in *Hager* v. *Reclamation District*, 111 U. S. 701, 708, it was held that "undoubtedly where life and liberty are involved, due process requires that there shall be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard." By article III, sec. 2 of the Constitution, "the trial of all crimes, except in cases of impeachment, shall be by jury;" and by the Fifth Amendment, "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Summing this up, banishment is a punishment and of the severest sort. There can be no punishment except for crime. This petitioner has been guilty of no crime, and so judicially determined. Yet in defiance of this adjudication of innocence, with only an examination before a ministerial officer, he is compelled to suffer punishment as a criminal, and is denied the protection of either a grand or petit jury.

But, it is said, that he did not prove his innocence before the ministerial officer. Can one who judicially establishes his innocence of any offence be punished for crime by the action of a ministerial officer? Can he be punished because he has failed to show to the satisfaction of that officer that he is innocent of an offence? The Constitution declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of invasion or rebellion the public safety may require it." There is no rebellion or invasion. Can a citizen be deprived of the benefit of that so much vaunted writ of protection by the action of a ministerial officer?

By section 8 of the act of September 13, 1888, (25 Stat. 476,) the act prohibiting the coming of Chinese laborers, the Secretary of the Treasury was authorized to make rules and regulations to carry into effect the provisions of the statute. This authority by subsequent legislation has been vested in the Secretary of Commerce and Labor, by whom some sixty-one rules have been announced. In the second rule it is provided that "if the Chinese person has been born in the United States, neither the immigration acts nor the Chinese exclusion acts prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States apply to such person." Rule 46 reads: The provisions of the laws regulating immigration, excluding those which prescribe payment of the head tax, apply to the residents and natives of Porto Rico and Philippine Islands, and, moreover, the provisions of the laws relating to the exclusion of Chinese apply to all such persons as are of the Chinese race, except those who are born in the United States." In other words, the department rules exclude from the jurisdiction of the immigration officers citizens of Chinese descent, and limit that jurisdiction to Chinese aliens. In *United States* v. *Wong Kim Ark*, 169 U. S. 649, it is stated (p. 653):

"It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese exclusion acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him."

By the act of August 18, 1894, (28 Stat. 390,) it is provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." The same limitation of finality to the case of aliens is repeated in the act of March 3, 1903, (32 Stat. 1213.) So it appears that this court discharged from the custody of the immigration officers a person of Chinese descent on the ground that he was a citizen of the United States, doing this upon the concession of the Government that if he was a citizen the exclusion acts had no application to him; that Congress in terms makes the decision of the immigration officer final only when the party is an alien, and that the rules prescribed by the proper department exclude from the operation of the law citizens of the United States of Chinese descent. Yet, in spite of all this, it is held that this citizen of the United States must, by virtue of the ruling of a ministerial officer, be banished from the country of which he is a citizen. And this upon the ground that such officer has a right to decide whether he is or is not a citizen, and his decision on the question excludes all judicial examination.

Let us see what have been the rulings of this court in other cases, and first in respect to judicial decisions. In *Thompson* v. *Whitman*, 18 Wall. 457, Thompson, a sheriff of a county in New Jersey, was sued by Whit-

man for taking and carrying away a sloop, the property of the plaintiff, and justified his action by the judgment of a court, which had ordered the sloop to be sold for violating a statute of New Jersey in reference to raking and gathering clams. There was thus a judicial determination of the liability of the sloop to seizure and condemnation. Notwithstanding this judicial determination this court held that the plaintiff might show, as a matter of fact, that the sloop was not within the limits of the State of New Jersey, and therefore was not violating its statute. In the opinion, by Mr. Justice Bradley, this quotation was made from the opinion of Chief Justice Marshall in *Rose* v. *Himely*, 4 Cranch, 269:

"'Upon principle,' says Chief Justice Marshall, 'it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.'"

Rose's "Notes on United States Reports" show that a multitude of cases, both State and Federal, rely upon *Thompson* v. *Whitman* as authority. Among them is *Scott* v. *McNeal*, 154 U. S. 34, in which it was held that a court of probate, having jurisdiction in the administration of deceased persons, had no jurisdiction to appoint an administrator of one who was alive, although he had been absent and not heard from for seven years, and that a sale made by the administrator appointed in such a case passed no title. It was cited approvingly in *Andrews* v. *Andrews*, 188 U. S. 14. There a decree of divorce, rendered by a South Dakota court in a case in which both parties were in court and in which the court found not only that there were sufficient grounds for divorce, but also that the plaintiff had been a *bona fide* resident of South Dakota for the statutory length of time, and therefore had the requisite status to give that court jurisdiction, could be upset in Massachusetts by proof that the plaintiff was not in fact a *bona fide* resident of South Dakota. The same case was also relied upon as authority in *Bell* v. *Bell*, 181 U. S. 175, 177, where we said:

"No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce must have had a *bona fide* residence within the State for one year next before the filing of the petition. . . . The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. *Thompson* v. *Whitman*, 18 Wall. 457."

I have always supposed that a judgment of a court of competent jurisdiction was at least as conclusive as the finding of a ministerial officer, and that the right of personal liberty was as sacred in the eyes of the law as the title to a sloop.

Turning now to the action of ministerial or administrative officers, and what has been the uniform ruling of this court? Take the Land Department. Questions of fact within the undoubted jurisdiction of that department are considered as settled by its rulings. Bnt questions of fact upon upon which its jurisdiction rests are never so regarded. Thus, whether a tract of public land be swamp, mineral or agricultural, may be finally determined by the department; but whether a tract is public land is not so determined, and in all the multitude of cases that have been presented to this court it has never even been suggested that a ruling of the department that a tract was public land was conclusive unless it appeared that the Land Department was guilty of some abuse of its discretion or powers. The question, and the only question, has been was the tract public land or not? In *United States* v. *Stone*, 2 Wall. 525, it appeared that a tract of land adjacent to a military post had been at one time surveyed, and by that survey was included within the military reservation. Subsequently a new survey was had, by which this tract was excluded, and thereafter it was, in due course of administration, patented. Thereupon this suit was brought to set aside the patent. It was not suggested that the Land Department had been guilty of any irregularity in administration, or had not proceeded in accordance with the established rules of procedure; yet the court unanimously held that the patent must be set aside, on the ground that the land was reserved to the United States as a part of the military reservation by the original survey. In *Smelting Company* v. *Kemp*, 104 U. S. 636, 641, we said:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide."

It would be an affectation to attempt to cite all the authorities in which this doctrine is announced. In *Doolan* v. *Carr*, 125 U. S. 618, decided in 1887, Mr. Justice Miller cites more than a dozen cases as directly in point. Since then the doctrine has been again and again restated.

Take also the matter of imports. The Secretary of the Treasury is charged with the collection of the duties on them, but has it ever been held or even suggested that a ruling of the customhouse officers, approved by the Secretary of the Treasury, is a final determination that the article so passed upon was subject to duty and precluded the courts from inquiring as to that fact? Certainly this court has wasted a great deal of time determining whether a given article was subject to duty or not if the decision of the customhouse officers, approved by the Secretary of the Treasury, was a final decision of the question.

But it is said that the exclusion acts speak of Chinese persons, and that such term includes citizens as well as aliens, and, therefore, Congress has given power to the immigration officers to banish citizens of the United States if they happen to be of Chinese descent. But obviously the statutes refer to citizens of China and not to citizens of the United States. The treaty of 1894, (28 Stat. 1210,) in execution of which most of these statutes were passed, speaks on the one hand of Chinese subjects in the United States and on the other of citizens of the United States in China. The treaty declared the rights and burdens of Chinese citizens in the United States, as well as the rights and burdens of citizens of the United States in China. The treaty then placing Chinese subjects over against American citizens must have had in mind citizenship and not race. The legislation carrying that treaty into effect must be interpreted in the light of that fact. The statutes of the United States expressly limit the finality of the determination of the immigration officers to the case of aliens. It has been conceded by the Government that these statutes do not apply to citizens, and this court made a most important decision based upon that concession. The rules of the department declare that the statutes do not apply to citizens, and yet in the face of all this we are told that they may be enforced against citizens, and that Congress so intended. Banishment of a citizen not merely removes him from the limits of his native land, but puts him beyond the reach of any of the protecting clauses of the Constitution. In other words, it strips him of all the rights which are given to a citizen. I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the Constitution guarantees, and if it did so intend, I do not believe that it has the power to do so.

Mr. Justice PECKHAM concurred in the foregoing dissent.

Mr. Justice DAY also dissented.